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LEGAL STATUS OF CALIFORNIA, 1846-49.

The United States in its federal capacity is required to guarantee to every state in the union a republican form of government. This implies the establishment of some government within each state, and hence a constitutional convention. New states to be formed out of territory of the United States, organized under its authority or acquired in an organized condition from foreign states, call for a second class of conventions to frame constitutions for such states. Such conventions are regularly assembled in pursuance of enabling acts of Congress. But there is another limited variety of conventions including such as have been convened by the inhabitants, or the temporary governments of organized territories, irregularly, without enabling acts of Congress. Among this last, or irregular class, Dr. Jameson mentions, somewhat inaccurately, the California convention of 1849.* Certainly the California convention was irregular; but it is well known that previous to the convention, California was not an organized territory of the United States; also that the convention did not meet at the free instance of the inhabitants. Not only so, but it will also plainly appear as the discussion proceeds, that the conditions under which the first California convention was held were wholly without exact precedent.†

The actual conquest of California by Americans was signalized by the hoisting of the Bear Flag at Sonoma, on June 15, 1846, by a few men under command of Captain Frémont. This rude but long since famous flag bore under the emblems of the lone star and grizzly bear the legend, "California Republic." Whatever may have been Frémont's real motives in this apparently almost wanton revolt, it is certain that his followers had little or no intention of erecting

* Jameson, "The Constitutional Convention," p. 178.

† See Gwin's exposition, Browne's "Debates," p. 393.

a permanent republic on the Pacific coast, but that for the most part they were patriotic Americans. The anomaly known as the California Republic was, as an independent government, insignificant, and extremely short-lived.

On July 7, Commodore Sloat, who had arrived a few days earlier, formally took possession of Monterey, the early capital of California. As soon as the Stars and Stripes floated over the land, the Bear Flag party abandoned the purpose of an independent revolution and the Bear Flag itself was superseded by our national ensign. Commodore Stockton arrived July 15, and succeeded Sloat at the desire and request of the latter, as commander-in-chief of all forces and operations on land, assuming active command shortly after his arrival. Sloat had lacked sympathy with the American revolutionists, and his conservative policy forbade his utilizing the forces of Frémont; but Stockton, having learned of the state of war while in Mexico, immediately adopted an aggressive policy, and decided to extend the occupation to the south territory. He accordingly organized the forces of Frémont as the California Battalion of Mounted Riflemen, which proved instrumental in completing the conquest.* Thus, then, while war was in progress between the United States and Mexico, the Mexican province of California was taken military possession of by United States forces.

On assuming command, Commodore Stockton had issued an undignified and impolitic address to the people, which in its tone was an offensive declaration of martial law.† This address neither embodied the views of Commodore Sloat nor conformed with the governmental policy at Washington.‡

* The conquest was easily accomplished, without a single important battle. Bidwell in *Century*, Vol. xli, p. 523.

† House Executive Documents, First Session, Thirty-first Congress, Vol. i, pp. 31-33.

‡ As witness its closing sentence: "As soon, therefore, as the officers of the civil law return to their respective duties, under a regularly organized government, and give security to life, liberty, and prosperity alike to all, the forces will be withdrawn, and the people left to manage their own affairs in their own way."

It was the fixed purpose of the administration at Washington to retain this country and make of it a permanent part of our national territory. Stockton, it would appear from his address, did not care to make California a territory of the United States; nor did he appear to desire any of its lands for his government.* His address scarcely contained a hint that it was to be held until a treaty should be concluded between the United States and Mexico. His alleged motive for completing the conquest was "to bestow peace and good order on the country:" this, however, was obviously inadequate and secondary.

California was now conquered territory. As such it could have no determinate status on a peace basis while war with Mexico continued; nor was it yet a part of the United States territory, except as a temporary military possession. The Department of California was conquered territory subject to temporary military control. Now conquered territory, according to a well-defined principle of international law, regularly retains its prior municipal institutions, the conqueror being authorized to ordain needful temporary laws and regulations.† The laws of Mexico which had hitherto obtained in California should have been continued by the military rulers of the country until those rulers had put in operation some other provisional government;‡ and indeed this principle was distinctly proclaimed by Commodore

* Bancroft, "History of California," Vol. v, p. 258.

† This is the view, in the main, that I conceive President Polk, not with strict consistency, to have held. See his Message to Congress, December 8, 1846. But in Congress widely divergent views were adhered to. Mr. Douglas held that the province belonged to the United States by conquest, and that no proclamation was needed to make it ours. Mr. Rhett, at the other extreme, urged that the conquered territory rested on the power of the sword alone, whether the government was civil or military in character. Mr. Bayly declared the President to be a usurper in establishing or authorizing civil government in the conquered territory. Mr. Seddon approximated the President's position, holding it to be the right and duty of the military commanders to establish provisional civil government, and maintaining the power of annexation and incorporation to be the prerogative of the conquering nation, to be exercised, however, only by Congress.—*Congressional Globe*, 1846-47, pp. 14, 15, 23-26, 75.

‡ *California Star*, June 19, 1847.

Stockton who, on August 17, 1846, issued from Los Angeles a proclamation to the people in which he said, in part:

"The Territory of California now belongs to the United States, and will be governed as soon as circumstances may permit, by officers and laws similar to those by which the other territories of the United States are regulated and protected. But until the Governor, the Secretary, and council are appointed, and the various civil departments of the government are arranged, military laws will prevail, and the Commander-in-Chief will be the Governor and protector of the territory. In the meantime the people will be permitted, and are now requested to meet in their several towns and departments, at such time and place as they may see fit to elect civil officers and fill the places of those who decline to continue in office; and to administer the laws according to the former usages of the territory. In all cases where people fail to elect, the Commander-in-Chief will make the appointments himself." *

This proclamation put in force at the same time two kinds of law, the one civil, the other military. Many deemed them irreconcilable: but the temporary existence of military rule is plainly not inconsistent with the perpetuation of the civil institutions and regular administration of justice of the conquered province. The military commander is clothed with certain civil functions; the civil laws and their officers receive their sanction from the military domination.† But while the civil law of Mexico was thus proclaimed, and the President assumed that a temporary government was in operation, as a matter of fact Mexican law never was, and from the nature of the case could not be, put in full operation

* *California Star*, January 9, 1847.

† The *Star*, January 16, 1847, gave a lucid exposition of the reconciliation of laws. It said, in part: "Military law does not affect the citizens in their private relations with each other . . . it affects them only in their relations to their government. . . . The courts of the country are never brought under the influence of martial law, but are only affected by it in their character of private individuals and not as courts; and unless their proceedings are entirely superseded, they must be governed by the civil or municipal laws alone." The question of the co-existence of civil government and military rule was being discussed almost simultaneously in Congress. Mr. Douglas had said: "Without some form of civil government, all must be anarchy, and riot." Mr. Seddon had ably argued the continuance of the civil institutions and regular administration of justice of the conquered province. —*Congressional Globe*, 1846-47, pp. 15, 24.

after the American conquest, and the military commander had not established any satisfactory civil government in its stead.* Almost immediately after the conquest, the American inhabitants began to complain, not only of the inadequacy and want of uniformity in the Mexican laws theoretically in force, but also of the actual absence of any rational system of law. This just complaint was destined to grow louder and more bitter from the moment of the conquest till the eve of the Constitutional Convention.

There was much uncertainty as to what laws were in force at a given moment. As early as January 9, 1847, the *California Star* reflects the not uncommon feeling of dissatisfied uncertainty. The alcalde was the sole judicial officer of California at this period. Among native Californians the functions of the alcalde had been perpetuated by tradition. One such officer retained jurisdiction at each centre of population. This jurisdiction had come to be exceedingly vague, variable, and uncertain in scope. The much-talked-of Mexican system of law, theoretically continued in full operation, was in reality narrowed down to a number of local alcaldes, the most powerful one being resident at Monterey, but each having an indeterminate status. Inadequate as was this system of district judges under later Mexican rule, it was vastly more unsatisfactory as well as positively distasteful to progressive Americans: "hard headed American pioneers demanded a better system of government than the Mexican law gave them." †

Since Americans began to succeed Mexicans, or Spaniards, as alcaldes, almost immediately following the conquest, the growth of American law was inevitably rapid. While theoretically the Mexican civil law continued in force, in fact

* *California Star*, June 19, 1847, also *Alta California*, June 14, 1849, and earlier dates.

† Fitch, in the *Century*, Vol. x1, p. 779. On the alcalde, see Royce, "California," pp. 200 et seq.; Hittell, "History of California," Vol. ii, pp. 656 et seq.; Moses, "Municipal Government in San Francisco," pp. 95 et seq.; newspapers of the period, etc.

the Americans, more especially the newly appointed *alcaldes*, had brought their own notions of common law principles and forms. At once a process of amalgamation was commenced, and very naturally the American law—not very accurately represented, to be sure—rapidly supplanted the obsolescent customs and procedure. Although there seems to have been no early official decree to warrant it, the trial by jury* was soon in common practice, fairly well defined and understood, and sanctioned by the governor.† Likewise it was recognized that the English language would inevitably supplant the Spanish.‡

Commodore Stockton had prepared a plan for civil government, and had drafted a constitution; but this was never put in full operation. His purpose was thwarted by a serious revolt of the natives, to put down which involved considerable time and fighting and some bloodshed. Before the authorities were again in a position to undertake better civil organization, their plans were interfered with by several important and unexpected events. General Kearny entered California in November, 1846, and shortly afterward followed the unfortunate controversy as to the relative positions of the two officers.§

Who possessed the rightful authority to govern the conquered territory? The actual status of the country at the time of Kearny's arrival had not been, and could not be anticipated by Kearny's instructions. Weakened and humbled at San Pascual, his consciously delicate situation doubtless had much influence in deciding him to refrain

* Nothing like the trial by jury was known to the Mexican system; but Walter Colton, the first American *alcalde* of Monterey, summoned at the early date of September 4, 1846, the first jury in California, he having been in office scarcely a month. Hittell, *op. cit.* Vol. ii, p. 663; Bancroft, *op. cit.* Vol. vi, p. 258.

† Mason's general order, issued December 29, 1847, directed trials by jury in all cases before the *alcaldes'* courts where the amount involved exceeded one hundred dollars. House Executive Documents, First Session, Thirty-first Congress, Vol. xvii, p. 452; Hittell, *op. cit.* Vol. ii, p. 664.

‡ *Californian*, October 10, 1846.

§ For details and evidence on both sides of this controversy, consult Bancroft, *op. cit.* Vol. vi, Cap. xvi, especially foot-notes.

from asserting his claim to the chief command at that time. Stockton even states that he proffered Kearny the chief command, and that the latter declined it. Even assuming as established that Kearny originally had the right to command, it is easy to understand how, under the peculiar circumstances, Stockton might come to regard himself as possessing permanent precedence. So, when a little later Kearny asserted his authority, Stockton firmly refused to recognize it. The controversy deepened; Kearny, having an insufficient command to enforce his claims, decided to await further instructions from Washington; it is certain that Stockton was generally recognized by the people as military commander and territorial governor until the date of his departure. On January 14, 1847, he tendered Colonel Frémont his commission as governor of the territory. For a term of perhaps fifty days Frémont, having acted in direct disobedience to Kearny's orders, was quite generally recognized as governor; during these days Kearny's claims were of course not relinquished. Instructions came in February positively directing that the senior officer of the land forces (Kearny) should be civil governor. Then followed the Frémont-Kearny controversy the upshot of which was the court-martial of Frémont, his conviction, and subsequent remission of punishment.

On March 1 General Kearny, jointly with Commodore Shubrick, then commander of the naval forces as Stockton's successor, issued a circular in which he formally assumed the governorship, and designated Monterey as the capital.* This proclamation seems to have had the immediate effect

* "California Message and Correspondence," pp. 288-89. I quote a portion to show the status as he conceived it, and the good intentions looking to an organized government: "The President of the United States having instructed the undersigned to take charge of the civil government of California, he enters upon his duties with an ardent desire to promote, as far as he is able, the interests of the country and the welfare of its inhabitants. . . . It is the wish and design of the United States to provide for California with the least possible delay, a free government similar to those in her other territories; and the people will soon be called upon to exercise their rights as freemen, in electing their own representatives to make such laws as may be deemed best for their interests and welfare."

of encouraging the Americans to look for the peace and tranquillity which should follow upon the establishment of the civil government expected.* But the civil government, now so long anticipated, was not yet forthcoming; affairs continued in their extremely uncertain and almost chaotic state. Honest seekers after laws were unable to find them: the desideratum of exact statutes was unattainable to those common-sense pioneers. An interesting editorial, on "The Laws in Force," in the *Star* of March 27 says, in part:

"Some contend that there are really no laws in force here, but the divine law and the law of nature, while others are of the opinion that there *are* laws in force here if they could only be found. . . Both sides, however, seem to agree that the 'former usages' have been in force. . . We have not been able to discover any traces of written law particularly applicable to this territory except the Bandos of the Alcaldes which could not have been intended to apply to any except those within their jurisdiction. We have frequently heard it stated that there are general written laws of the people of the whole territory, but we have not as yet been able to discover their 'whereabouts.' . . . It seems to us that the continuance of the former laws in force, when it is impossible to produce them in any court in the country, or for the people to ascertain what they are, will be productive of confusion and difficulty."

Civil government to the non-Spanish reading Americans in California at this period was obviously entirely wanting as an objective reality. The growing dissatisfaction did not pass unexpressed; ominous murmurings began to be heard, and the alleged right of self-government found frequent utterance.†

* See editorial in *Californian*, March 13, 1847.

† As early as August, 1846, the claim of the right of self-government began to be asserted. In the first number of the *Californian* is an editorial on the "Prospects of California," in which the editors affirm: "No impediment now exists to the establishment of a colonial government in California, all patriotic citizens should unite at once for this purpose." In the *Star* (April 17, 1847) a correspondent declares: "The people themselves, independently of Mexico, and with the consent of the officers of the United States now in command, have perfect right to enact laws for their own government."

While the early American settlers were dilating upon their wrongs and clamoring for their supposed rights, it scarcely occurred to them that on technical grounds it might be urged that they themselves were aliens to the United

On May 31, 1847, General Kearny left Monterey on his return to the United States, being succeeded in military and civil command by Colonel R. B. Mason, who was thus military commander with full power to establish temporary civil government. A single sentence from Secretary Marcy's letter of instructions will serve to indicate his position as contemplated by the administration:

"Under the law of nations the power conquering a territory or country has a right to establish a civil government within the same, as a means of securing the conquest, and with a view to protecting the persons and property of the people, and it is not intended to limit you in the full exercise of this authority."*

Pending the establishment of a temporary civil government, the territory was plainly under military rule, and it is an unmistakable inference from his correspondence that Mason considered the supreme power vested in himself as senior military officer.† He heard the clamors for better organization, he recognized the needs of the American settlers as well as the disaffection of the Californians; but he felt the strictures of his own belligerent authority, and assumed, perhaps wisely, a conservative attitude. He expected within a very short time to "have the good tidings of peace," which should bring the certainty that California would forever belong to the United States.‡ While proclaiming the continued existence of former institutions and usages, as his predecessor had done, he virtually acknowledged his ignorance of the most important of these institutions:§ and

States in conquered territory. So far from considering themselves a *conquered* people, they took to themselves, in large measure, the credit of being the real *conquerors*.—for had they not welcomed the American forces, and rendered their commanders invaluable assistance? While they had left the United States, they yet accounted themselves perfectly loyal Americans, and rationally viewed, they were right. The highly strained and technical view that they were military captives (See Royce, "California," p. 200) hardly merits more than a mere mention. Manifest destiny had decreed California to become a part of our union.

*"California Message and Correspondence," pp. 244-45.

† Ibid., pp. 317-18, 321.

‡ Ibid., pp. 318-19.

§ Ibid., pp. 317, 322; *California Star*, April 8, 1848, correspondence of "Pacific."

so that *quasi*-patriarchal officer, known as *alcalde*, was continued in the exercise of increasingly elastic and indefinite powers.

But notwithstanding the fact that Colonel Mason faithfully studied the situation, it became more and more evident that while the war with Mexico should continue, no satisfactory organization on the old Mexican basis could be reached. No action in Congress was now longer reasonably to be expected; Mason, as military ruler, maintained a strictly conservative policy and hoped for tidings of peace.* Meanwhile, he set about discovering and formulating the "principal features of Mexican law applicable to the country at the time of the conquest." A few days before the news of peace reached him, he had ready for publication a code of laws "for the better government of California." This code, a volume of 140 pages, is said to have been printed in the English and Spanish languages; but on receipt of tidings of peace, Governor Mason withheld its publication, and so the much talked of, but ever invisible, "former laws and usages," of Mexico, theoretically in force in California, were destined to remain undiscovered to the eager Americans, nor was any attempt ever made to enforce the laws thus codified and thus withheld from the people.†

The territory of California was, then, under strict military rule during that period of Colonel Mason's governorship ending with the tidings of peace with Mexico, received August 6, 1848. Under the military rule the American settlers grew exceedingly restive; their murmuring became ominous growling and bitter complaint. The newspapers of the day reflect the general discontent.‡ The very absence of fixed, well-defined and generally understood law evoked

* The *Californian*, May 3, 1847, says editorially: "We have been credibly informed that Governor Mason has relinquished the project of a civil organization . . . as he is in daily expectation of a communication from Washington probably appointing a governor and furnishing a pattern-code of laws."

† *Californian*, August 14, 1848; *Alta Californian*, June 4, 1849.

‡ See the *California Star*, June 26, *Californian*, June 5, 12, etc.

the loudest complaints. As the months passed, as immigration increased, as the country became gradually developed—all without a uniform system of law and with a government which no one understood,—the Americans conceived their already grievous wrongs greatly aggravated; hence the situation, already long unsatisfactory, was fast becoming critical.* The more radical of the settlers began vigorously to denounce the early officers of the conquest and violently to assail the military government, and under the highly disturbed and half-chaotic condition of affairs there was incitement toward the movement of popular self-government.†

The discovery of gold early in 1848 was an event not calculated to mitigate the gravity of the situation. Some sort of law was made absolutely imperative by the great influx of gold hunters from all nations. The discovery gave an enormous impetus to the movement toward popular organization, especially state organization, and proved to Congress the futility of dallying longer with the question.

We have now followed the main current of political events in the province of California from the American conquest to the ratification of the treaty of peace between the United States and Mexico. The California Republic, proclaimed by Frémont, was nominal, short-lived, and, as a separate government, insignificant. The succeeding governors from Sloat to Mason held office by virtue of military, or naval rank. While the administrations of these rulers varied in efficiency, while their instructions usually allowed wide discretionary powers and were not always consistent, and while local conditions were constantly and materially changing, there was always military domination, under forms varying from merely nominal authority to strict martial law, up to the moment the treaty was ratified.

*See the contemporaneous journals, especially "Pacific's" correspondence in the *Star*, April 8, 1848, and *Californian*, February 2, 1848.

†See controversy between "Pacific" and "Sober Second Thought" in the *Californian*, January-February, 1848.

Under this dominion, and deriving its sanction from it, was the effete, unsuited and increasingly unsatisfactory civil government, previously existent in the province, and now imperfectly perpetuated. Although the later military governors especially were given full power to establish a suitable temporary government, no such government was ever put in operation.

The Treaty of Guadalupe Hidalgo was concluded on February 2, 1848, and duly ratified at Querétaro on May 30. By its terms the territory of California was ceded to the United States, of which it became completely a part. News of the treaty reached California on August 6, and it was announced on the following day in a proclamation by Governor Mason. Of course there could be no apparent change in the government of the territory until after August 6; but technically from the moment of the ratification of the treaty the military rule was ended, and hence ceased to have obligatory authority. California now entered her most critical period, so often and so justly characterized as the "No-Government Period."* In his proclamation announcing the treaty Mason takes an extremely hopeful view of the situation, and believes that "instead of revolutions and insurrections there will be internal tranquillity; instead of a fickle and vacillating policy, there will be a firm and stable government, administering justice with impartiality, and punishing crime with the strong arm of power."† He is fully convinced that Congress will soon confer upon the people the "constitutional rights of citizens of the United States," that a regular territorial government will be an accomplished fact, and

"There is every reason to believe that Congress has already passed the act, and that a civil government is now on its way to this country,

* Bayard Taylor, "Eldorado" p. 146. Mr. Fitch asserts: "There was absolutely no precedent for the cession of the territory, and the neglect of Congress to provide territorial officers left California in the unique position of a land without a government."—*Century*, Vol. x1, p. 782; see Semple's statement in *Convention*, Browne's "Debates," p. 23.

† In the *Californian*, September 2, 1848.

to replace that which has been organized under the rights of conquest."

Unfortunately the civil government was not so near at hand. California was destined to continue through many trying months practically without any organized form of government.

The great migrations to the land of gold had begun, for California had become the "focus of the world's attention," and was "to be morally and socially tried as no other American community ever has been tried."* Mason continued as *de facto* head of the *quasi*-civil government under military rule, in daily expectation of instructions from Washington. He admitted that the territory was without civil government, and yet, keenly awake to the conditions as they then existed, he suffered technicalities to give way to practical common sense, judicially applied.†

The first session of the Thirtieth Congress adjourned August 14, leaving California in an anomalous condition. This fact was fully recognized by the President, who announced, through Secretary Buchanan, the existence of a *de facto* government, justifying it by the "great law of necessity."‡ "The termination of the war," wrote the secretary, "left an existing government *de facto*, in full operation, and this will continue, with the presumed consent of the people, until Congress shall provide for them a territorial government." In November, before it was known that Congress had adjourned without providing for its government, Commodore Jones arrived and held a conference with Acting-Governor Mason. Both were impressed with the necessity of immediate action, and they agreed that in default of the arrival of the sloop *St. Mary's* with the long-expected territorial government, the people should be encouraged to appoint delegates who should "frame laws and

* Royce, "California," pp. 221-22, see Hittell, *op. cit.*, Vol. II, p. 675.

† "California Message and Correspondence," p. 497.

‡ See Buchanan's letter, "California Message and Correspondence," pp. 6-9: it bears the date of October 9, 1848.

make other necessary arrangements for a provisional government of California.”*

The arrival of the *St. Mary's* with the not altogether unanticipated news of congressional failure to provide settled the question of territorial government during 1848. Secretary Buchanan, in his open letter to the people, advised them to “live peaceably and quietly under the existing government;” but to those conversant with the character of that *de facto* government and the rapidly shifting conditions—and to none more certainly than to Colonel Mason—it was perfectly obvious that to comply with Buchanan's request was daily becoming more difficult, and fast approaching the impossible. Even before the letter arrived, the people had begun to act upon their convictions. The “uncertain, amphibious character”† of the ruler and his strict adherence to a conservative policy, the vast influx of an extremely heterogeneous population, the daily augmentation of the criminal class and increase of depredations upon life and property, and the impotence of the half-Mexican, half-American judicial system are among the causes which appealed to all good citizens to be active in the organization of some suitable government with the least possible delay.

The first preparatory movement of the kind was an enthusiastic meeting of the citizens of Pueblo de San José.‡ Provisional government meetings, after the first of December, were frequent in San Francisco, San José and other leading towns of the territory. The sentiment in favor of a popular provisional government seems to have been practically unanimous among the thinking people. Stirring resolutions, drafted by some of the best legal talent of California, were adopted. The San José meeting recommended that a convention “for the purpose of nominating a suitable candidate for governor,” and other suitable business, be held at that

* *Star and Californian*, November 25, 1848.

† Von Holst, “History of the United States,” Vol. iii, p. 462.

‡ December 11, 1848. See *Star and Californian*, December 16.

place on the second Monday in January, 1849.* At San Francisco a similar recommendation was adopted, the date of the proposed convention being fixed at the first Monday in March, 1849.† On February 12 the people of San Francisco met in mass meeting and established a temporary government for that district.‡ Thus the legislative assembly of San Francisco, comprising among its fifteen members the ablest local representatives of the settlers' theory of the legal status of California came into existence, with motives whose patriotism cannot be impeached and members most honored in California's annals.

On April 12, the *Iowa* landed with General Bennett Riley on board, who, on the following day, relieved Colonel Mason as Acting-Governor of California. On assuming command of the civil affairs it was General Riley's intention to complete the organization of the existing government and to call a convention "for forming a state constitution, or plan of territorial government, to be submitted to Congress for its approval."§ But, on further consultation, he deemed it best to postpone all such action until it might be ascertained what Congress had done in the short session. The steamer *Edith* bore him the information that the national legislature had again adjourned without making any provision for the civil government of California. He forthwith issued a proclamation, June 3,

"defining what was understood to be the legal position of affairs here, and pointing out the course it was deemed advisable to pursue in order to procure a new political organization better adapted to the character and present condition of the country."||

* *Star and Californian*, December 23, 1848.

† Reasons for this proposed delay are set forth in the *Alta California*, January 4, 1849. Several dates were recommended by the various district meetings; but finally the first Monday of August—a date remote enough to allow the southern districts to be represented—was agreed upon. See *Alta California*, March 22.

‡ See address of the Assembly in reply to General Riley's proclamation against that body; published in the *Alta California*, August 9, 1848. The address is signed by Peter H. Burnett, Henry Harrison and S. R. Gerry.

§ See his letter to General Jones, "California Message and Correspondence," pp. 748-52.

|| *Ibid.*, p. 748. The proclamation is on pp. 776-80; also in *Alta California*, June 14.

In this proclamation—which had doubtless been in contemplation for some time, and which showed a careful study of the situation—Governor Riley appointed the first day of August for the selection of delegates to a general convention, which should convene in Monterey on the first of September following, and proceed to form a state constitution or a plan for territorial government.

In the meantime General Riley had been made aware of the existence and force of the San Francisco Legislative Assembly, which in the absence of government (as it claimed) had been assuming new and extended powers. It did not recognize any *civil* power as residing in General Riley, a military officer, but deemed itself entitled to frame a temporary government for the protection of life and property in the district,* and to co-operate with the other districts in the movement toward popular organization. At this period, as throughout its short but useful career, the assembly was a loyal American body, numbering among its members many of California's most patriotic pioneers.† Considerable excitement was produced by the information that Congress had the second time failed to provide; this was greatly aggravated by the news of the extension of the revenue laws over California and the appointment of James Collier as collector. A public meeting being straight-way held, a committee, with Peter Burnett as chairman, prepared an address protesting against the injustice of taxation without representation.‡ The assembly, through the committee's address, again took occasion to assert what it considered its undoubted right:

“It is the duty of the government of the United States to give us

* See Lippitt's article in the *Century*, Vol. xl, especially p. 795.

† The *Alta California* makes a strong case in its justification of the existence and legislation of the assembly. See, for instance, an editorial, June 14, 1849.

‡ In *Alta California*, June 14, 1849. It says, in part: “For the first time in the history of the ‘model Republic.’ . . . the Congresses of the United States . . . have assumed the right not only to ‘tax us without representation,’ but to tax us without giving us any government at all.”

laws; and when that duty is not performed, one of the clearest rights we have left, is to govern ourselves."

Acting upon this supposed right, the assembly recommended a general convention to be held at San José on the third Monday in August,

"with enlarged discretion to deliberate upon the best measures to be taken; and to form, if they upon mature consideration should deem it advisable, a state constitution to be submitted to the people."

Before the address had been published, Governor Riley, fully cognizant of the powers assumed by the legislative assembly and of its recent actions, issued a proclamation* to the people of San Francisco, pronouncing the "body of men styling themselves the 'legislative assembly of the district of San Francisco'" an illegal and unauthorized body, which had usurped powers vested solely in the Congress of the United States, and warning all persons "not to countenance said illegal and unauthorized body, either by paying taxes or by supporting or abetting their officers."† Now the committee's address, which had been adopted before the promulgation of Riley's proclamation to the people of the district, was not published until a few days after the promulgation of the same. Thus there was an appearance of reckless defiance on the part of the assembly, which did not in fact exist.‡

But now, at last, in the middle of June, 1849, the opposing theories with reference to the legal status of California from the ratification of the treaty with Mexico to the adoption of the constitution on November 13, 1849, had been clearly defined and respectively defended in the territory itself. The two conflicting theories may be designated as the Settlers' Theory, sometimes called the Benton Theory; and the Administration Theory, sometimes called the

* "California Message and Correspondence," pp. 773-74.

† See Moses, *op. cit.*, p. 114; Bancroft, *op. cit.*, Vol. vi, pp. 277-78.

‡ See Burnett, "Recollections and Opinions of an Old Pioneer," pp. 325-26.

Buchanan Theory.* Since many of the salient features of both these have necessarily been set forth in the narrative, I must content myself with a rapid résumé, at this point.†

The leading advocate of the Settlers' Theory at Washington was Senator Benton. His recommendations to the people were substantially what the citizens were at that moment beginning of themselves to act upon in earnest.‡ Among the settlers themselves who were patriotic Americans interested in the permanent welfare of California, there was virtual unanimity of sentiment in favor of the Settlers' Theory.§ Without doubt a large part of the discussion was extremely passionate and biased; but that the moral and political wrongs endured by California during these critical months, and even years, were without parallel or precedent in our Union, is perfectly patent to any one at all acquainted with the conditions. One cannot expect an entirely dispassionate discussion or a calmly judicial poise amid such stirring, shifting, practical scenes in a place of world-confluence and a time so justly characterized as the No-Government Period.

Stripping the argument of all passion, the Settlers' Theory may be briefly stated as follows:|| The moment the treaty of Guadalupe Hidalgo took effect, the Constitution

* These names are applied mainly on the ground of mere convenience. There seems to be some doubt as to the exact position held by Buchanan and President Polk during the latter part of this period. Governor Burnett was of opinion that they adopted the view maintained by the more prominent settlers.—*Op. cit.*, p. 331.

† One of the best statements of the two theories extant is that of Burnett, *op. cit.*, pp. 329 et seq. Royce has a good statement in his "California" pp. 247 et seq. On this question see Mr. Botts' long speech in Browne's "Debates," pp. 274-84, and consequent discussion.

‡ His letter is in *Alla California*, January 11, 1849; see editorial comments, January 18.

§ See Burnett, *op. cit.*, p. 331, where he says: "Among the lawyers of California who had been here long enough to understand the true merits of the controversy, there was almost an entire unanimity in the opinion that only a *de facto* government could exist in the country, based upon the consent of the people. This was the view of three-fourths of the inhabitants."

|| Allowance must of course be made in any construction of this theory as I have here formulated it, for individual variation and hence slight latitude for deviation in details.

of the United States and American principles were extended over the acquired territory of California. Although no territorial system of American civil law has been regularly extended over or established in California, the Mexican civil law has been in fact superseded. Congress, whose primary power to legislate is admitted,* failing to provide a territorial government, it is no usurpation in the people to legislate temporarily for themselves in self-defence. As matter of fact, the government established during the war, was, at its conclusion continued as *de facto* government; but whereas it had before derived its authority from the rights of war, it now has no such source of power, but derives its authority from the "presumed consent of the people." A subordinate military officer can no longer legally fill the office of governor except by the sufferance of the people. While their presumed consent was "irresistibly inferred" by Secretary Buchanan in an *a priori* manner, it was historically entirely unreal; instead of consent there was express dissent and repeated protest against the *de facto* government.† Again, since the President, through his secretary, "urgently advises the people of California to live peaceably and quietly under the existing government," he evidently believes that the people had the *right* to change it. Because of the extraordinary exigencies of the situation, the Legislative Assembly of San Francisco was rightfully and legally formed, and the communities of Sonoma and Sacramento city followed the example, thus exercising temporary legislative power as the practical application of the rights implied by American citizenship.‡

Opposed to the Settlers' Theory was that which I have called the Administration Theory, which was maintained by

* This congressional authority, however, was not universally admitted. Mr. Botts emphatically denied it. See his conclusions in Browne's "Debates," p. 284.

† See *Alla California*. August 9, 1849, and earlier dates; also Fitch, in the *Century*, Vol. xl, p. 783, etc.

‡ Report of governmental agent, Thomas B. King, as published in Frost's "History of the State of California," pp. 108 et seq.; also Fitch, *op cit*.

the last territorial governors, notably by General Riley. Riley states his position, which is in accord with his instructions, in his proclamation to the people given May 3, 1849. This theory may be briefly summarized: Under a general principle of the law of nations, the laws of California, which were proclaimed to be in force after the American conquest, must, at the conclusion of peace with Mexico, continue in full force until changed by competent authority. That authority is vested solely in Congress. Hence, Congress failing to make other provision for the territory, the system of laws, defective as it is, which obtained under military rule, must in so far as they are not inconsistent with the laws, constitutions, and treaties of the United States, continue in force under the civil government *de facto*; the commanding military officer, by virtue of a vacancy in the office of governor, is *ex officio* civil governor. The Legislative Assembly of San Francisco, or any similar body, therefore, purporting to represent the people and presuming to legislate for them, is an illegal and unauthorized body, having usurped powers vested solely in the United States Congress.

I shall not attempt finally to decide this vexed question, by a technical argument, in favor of the one theory or the other. Without doubt, judged from a moral standpoint, the settlers were in the right, and would on the social ground of self-defence, have been justified in forming for themselves a temporary territorial government. Fortunately for state organization, as the event proved, they did not. On strictly legal grounds, Riley's position was in the main probably the more nearly correct, although he, as *ex officio* governor, as well as the administration at Washington, failed to maintain complete consistency.

Shortly after General Riley's proclamation of May 3, in which he appointed August 1, as the date for the election of delegates who should meet in constitutional convention in Monterey, on the first of September, events took place which should serve at once to show the patriotism of the

leading settlers and to give additional color to the legality of Riley's position. What the people wanted was an organized government; the end was paramount, the means secondary. Hence indications of satisfaction with, and acquiescence in Riley's plans began almost immediately to manifest themselves. The people of San José expressed their satisfaction June 7, other districts followed them. The controverted points seem to have been waived by many, and popular interest in the question of legal status was fast waning. On June 12 a committee of five from the San Francisco Legislative Assembly had been appointed to correspond with other districts relative to the proposed general convention of the people on their own authority. The committee, representing the stronghold of the Settlers' Theory, viewing the changing situation and recognizing the importance of success in the one desire of all parties, recommended the propriety "of acceding to the time and place mentioned by General Riley, in his proclamation, and acceded to by the people of some other districts." This concession, the committee held, was not one of principle, but a matter of mere expediency, for they still refused to recognize any rightful authority to *appoint* times and places as residing in General Riley.*

Thus the controversy was practically at an end, and with it died the mild revolution by the fiat of the people who created it. The legislative assembly ceased to exist. The members "were unwilling to use the powers vested by the people in them for the production or perpetuation of civil strife."† The general acquiescence in the plans of General Riley marked the emergence of California from a period of most remarkable internal disquietude, characterized, however, by extremely little violence, and left little doubt of speedy and satisfactory organization.‡

* *Alla California*, June 20, 1849; see Burnett, *op. cit.*, pp. 325-26.

† From the *Alla's* editorial on "The End of Revolution."

‡ In the early spring of 1849 Mr. Thomas Butler King had been sent as secret agent of the government to California to acquire the fullest possible information

The coming convention was now the one theme of discussion, so far indeed as all political discussion was not lost in the gold excitement. For the few intervening months before its assembling, the Mexican system of law must be put in operation. In order that it might be known, as well as possible, what the law really was, a translation and digest of such portions of the Mexican laws as were supposed to be still in force, was prepared by Secretary Halleck and Translator Hartnell, and three hundred copies were, on July 2, ordered for distribution among the officers.* In the South this worked naturally, but it was decidedly awkward in the towns and among the miners of the North. As a mere temporary arrangement while the country was being flooded with immigrants, it gave moderate satisfaction.†

The Constitutional Convention was at hand; this tardy digest excited little popular attention; few but lawyers cared to antagonize it. Complaints and pessimism were passing away; the glittering prospect of the new régime now at last amounted to assurance; it may almost be said to have been ushered in antecedently to the one event which made it actual,—namely, the making of the constitution.

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and to urge the people to give themselves a state constitution that they might petition Congress for admission into the union. "California Message and Correspondence," pp. 9-11. King arrived in California at the time when General Riley's proclamations were being issued. Here we come upon one of the happiest coincidences of California's history. The leading settlers of the territory loyally acquiesced in the *de facto* governor's plans, which also were thus approved by anticipation in Washington (instructions dated April 3), for Riley had resolved on calling a convention of the people's representatives before the arrival of King.

* This digest is in Browne's "Debates," app. xxiv et seq.

† Willey, in *Overland Monthly*, Vol. ix, p. 15.